Supreme Court, U.S.
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NO. 87 1784

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

STEPHEN J. GRAY, TRUSTEE IN BANKRUPTCY OF NEWBURY CAFE, INC., d/b/a 29 NEWBURY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

The question presented in this case is the same as that presented in United States v. Ron Pair Enterprises, Inc. (No. 87-1043), in which this Court has already granted a writ of certiorari:

> Whether Section 506(b) of the Bankruptcy Code entitles a creditor to receive post-petition interest on an oversecured claim allowed in a bankruptcy proceeding?

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Petitioner, the Commonwealth of Massachusetts, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case. The issue of statutory interpretation presented here is the same as the one presented in No. 87-1043, United States v. Ron Pair Enterprises, Inc., __ U.S. __, 56 U.S.L.W. 3647 (cert. granted March 21, 1988) ("Ron Pair").

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("A.") 1-11) is not yet reported. The opinion of the district court (A. 14-39) is reported at 80 B.R. 259 (D. Mass. 1987). The opinion of the bankruptcy court (A. 41-60) is reported at 72 B.R. 478 (Bankr. D. Mass. 1987).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 8, 1988. A. 12-13. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 506 of the Bankruptcy Code (11 U.S.C.) is reprinted at A. 63-64.

STATEMENT OF THE CASE

A. Section 506(b) of the Bankruptcy Code

The issue in this case is precisely the same as the issue in Ron Pair -- namely, whether §506(b) of the Bankruptcy Code (11 U.S.C.) permits an oversecured creditor that is a taxing authority to collect "post-petition" interest[1/] on its claim against the

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1/ Post-petition interest is interest that accrues from the date the debtor files in bankruptcy.

debtor by virtue of its statutory tax lien. Section 506(b) provides generally that where a creditor's claim against a bankrupt debtor is oversecured,[2/] "there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." Like the United States in Ron Pair, Massachusetts contends that an oversecured tax lien is to be treated for purposes of post-petition interest like any other oversecured claim under §506(b).

2/ A claim is oversecured where it is "secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim." Section 506(c), in turn, permits the trustee in bankruptcy to recover "from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of property to the extent of any benefit to the holder of such claim."

Respondent, Stephen J. Gray, Trustee in Bankruptcy for Newbury Cafe, Inc. ("the trustee") contends, and the court below held, that §506(b) permits post-petition interest only where the creditor's lien arises from an agreement with the debtor, and not where there is a "non-consensual" statutory lien, like the tax lien at issue here.

B. The Proceedings Below

On October 9, 1985, Newbury Cafe, Inc. filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§1101, et seq. Between October 1984 and April 1985 -- well before Newbury Cafe filed its Chapter 11 petition -- the Massachusetts Commissioner of Revenue recorded written "Notice[s] of Massachusetts Tax Lien" as prescribed by state law, Mass. Gen. Laws Ann. ch. 62C,

§50(a) (West 1988 Supp.). The recording of these notices perfected in favor of the Department of Revenue liens that arose upon Newbury Cafe's refusal to pay delinquent meals and withholding tax.

Some ten months after the Chapter 11 filing, in July 1986, the case was converted to one under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§701, et seq. Conversion followed the bankruptcy court's approval of a sale of all the estate's assets for $305,000.

On September 17, 1986, Massachusetts filed a timely proof of claim for the unpaid meals and withholding taxes in the bankruptcy court. The trustee has not disputed Massachusetts' secured claim to the extent of the tax due ($52,508.88), nor interest to the date the petition was filed (i.e., pre-petition interest) at the state

statutory rate prescribed by Mass. Gen. Laws Ann. Ch. 62C, §32 (West 1988 Supp.) ($13,230.37). The trustee does dispute, however, Massachusetts' claim to post-petition interest at the state statutory rate,[3/] which has been accruing at the rate of $25.89 per day.[4/] On September 26, 1986, the trustee instituted an adversary proceeding by filing a "Complaint for Determination of Secured Claims and Allocation of Sale Proceeds." This complaint asserted the trustee's objection to Massachusetts'

3/ The issue of what rate of post-petition interest would be appropriate has not been reached in this case because the threshold question of entitlement to post-petition interest has been decided against Massachusetts by the courts below.

4/ As of the date this petition for certiorari is filed, petitioner's post-petition interest claim totals approximately $21,853.00.

claim to post-petition interest, as well as other claims against other creditors.

On April 16, 1987, the bankruptcy court entered judgment for the trustee on his complaint against Massachusetts. The bankruptcy court relied largely on the decision of the United States Court of Appeals for the First Circuit in In re Boston & Maine Corp., 719 F. 2d 493, (1st Cir. 1983), cert. den. sub. nom. Cambridge v. Meserve, 466 U.S. 938 (1984), a case decided under the Bankruptcy Act of 1898 (ch. 541, 30 Stat. 544), not the Bankruptcy Code now in effect. A. 49-51; 55; 57. Boston & Maine held that, in the absence of any statutory provision in the Bankruptcy Act concerning post-petition interest on secured claims, notions of equity supported allowing interest in the case of "consensual" liens, but not in the

case of statutory liens -- such as tax liens. Boston & Maine, 719 F. 2d at 496-497. In following Boston & Maine, even in the wake of the new statutory provision, the bankruptcy court expressly rejected a recent decision by another bankruptcy court sitting in Massachusetts that took the opposite view, In re Russo, 63 B.R. 335 (Bankr. D. Mass. 1986). A. 59-60.

On appeal, the district court affirmed. Conceding that "a majority of courts appear to support [the Massachusetts Department of] Revenue's position," A. 18, the district court nonetheless rejected Massachusetts' claim. The district court perceived a grammatical ambiguity in section 506(b), and therefore concluded that "[t]o determine the appropriate outcome in such a situation, the Court must closely

examine the relevant policies underlying section 506(b)." A. 29. On that basis, the district court found dispositive the "policy" of the Code to disfavor "the more rapid depletion of the bankrupt's estate" that would result if "all over-secured creditors should be allowed post-petition interest" including "non-consensual creditors." A. 30-31 (emphasis in original).

In a brief opinion, the court of appeals affirmed. That court expressly incorporated and relied upon the opinion in In re Ron Pair Enterprises, Inc., 828 F. 2d 367 (6th Cir. 1987) -- the decision that this Court has already granted certiorari to review. A. 9; 11.

Just as in Ron Pair, the First Circuit placed heavy reliance on pre-Code cases finding post-petition interest payable only on "claims secured

by bargained-for or consensual liens." A. 7. Just as in Ron Pair, the court perceived ambiguity in the language of §506(b), and accordingly "look[ed] to "legislative history, and to what seems the more natural, and the more reasonable, in light of the Code as a whole." A. 8. Undertaking this inquiry, the court, like the court in Ron Pair, found that "[n]othing [in the legislative history] affirmatively rebuts the initial inference that Congress had no intention, in enacting section 506(b), to change existing law." A. 10. Even though the court cited nothing in the legislative history supporting its view, it nonetheless found that in the absence of such "affirmative" evidence supporting the state's view, this Court's decision in Midlantic National Bank v. New Jersey

Department of Environmental Protection, 474 U.S. 494 (1986), compelled the conclusion that pre-Code law must govern. A. 9-10. Accordingly, just as in Ron Pair, the court disagreed with the contrary interpretation of the United States Court of Appeals for the Fourth Circuit in In re Best Repair Company, 789 F. 2d 1080 (4th Cir. 1986), and "[t]he majority of courts construing [s]ection 506," which took the view adopted in Best Repair. A. 5. Instead, the court invoked its own pre-Code decision in Boston & Maine Corp., supra, where the court had found "equitable" considerations to favor a rule limiting

post-petition interest to consensual liens. A. 7.[5/]

REASONS FOR GRANTING THE PETITION

Only one month ago, this Court decided that the precise question presented in this case was worthy of review when it granted certiorari in Ron Pair. Certiorari should be granted in this case for the same reasons marshalled by the Solicitor General in support of certiorari in that case. Rather than burden the Court by rehearsing at length the arguments supporting review, petitioner will present its reasons in summary form.

5/ As of the filing of this petition for certiorari, Massachusetts has pending before the bankruptcy court a motion for a partial stay of distribution of the estate's assets. That motion seeks an order preventing distribution of the funds disputed here pending the conclusion of proceedings in this Court.

A. This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits About This Important Issue of Bankruptcy Law

The question whether the Bankruptcy Code authorizes nonconsensual lienholders to collect post-petition interest has sharply divided the lower courts. Both the Sixth Circuit in Ron Pair and the First Circuit in this case have adopted a position directly at odds with the view taken by the Fourth Circuit in Best Repair Co., supra. Nor is this conflict limited to the courts of appeals. Instead, as the First Circuit itself recognized, "[t]he majority of courts" construing §506(b) have agreed with the conclusion in Best Repair. A. 5; see Best Repair, 789 F.2d at 1082 (collecting cases); Ron Pair, supra, 828 F.2d at 372, n.9 (same).

Given this division, and the significant fiscal consequences for federal, state and local taxing authorities (as well as non-governmental creditors holding other nonconsensual liens), §506(b) should be authoritatively construed by this Court.

B. This Court Should Grant Certiorari to Clarify the Relevance of Prior Law in Interpreting the Bankruptcy Code

Similarly worthy of review is the extent to which a court interpreting the Bankruptcy Code should presume that Congress intended no change in existing law. Finding this Court's cases to require a presumption that existing law was preserved in the Code, the First Circuit, just like the Sixth Circuit in Ron Pair, gave short shrift to the express language of §506(b). That provision expressly says that "there shall be allowed to the holder of such

[an oversecured] claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." Thus, on its face, §506(b) allows oversecured creditors to collect post-petition interest and admits of no exceptions.[6/] The key clause --

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6/ As this Court recently observed about §506(b) in a different context, this provision contains "intricate phraseology" that is part of its "carefully drawn disposition" allowing post-petition interest when there is a "security cushion." United Savings Association of Texas v. Timbers of Inwood Forest Associates, __ U.S. ___, 108 S. Ct. 626, 631 (1988). In Timbers of Inwood, the Court held that undersecured creditors are not entitled to compensation under §362(d)(1) for delay in foreclosing on their collateral, and noted that authorizing interest for undersecured creditors under that section would be inconsistent with §506(b), which clearly permits post-petition interest to be paid "only out of the 'security cushion'" possessed by an oversecured creditor. 108 S. Ct. at 631. The Court further observed that "[s]ection 506(b)'s denial of post-petition interest to undersecured creditors merely codified pre-Code

(footnote continued)

"interest on such claim" -- is set off, both by the word "and" and by a comma, from the later clause providing for "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The court in Best Repair correctly recognized that the grammatical structure of the provision plainly "make[s] 'interest on such claim' a separate and distinct clause to which 'provided for under the agreement' does not apply." 789 F.2d at 1082. Basic rules of grammar support that conclusion. See W. Strunk, Jr.,

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(footnote continued)

bankruptcy law . . ." Id. The Court in Timbers of Inwood, however, had no occasion to construe §506(b) directly, nor to consider whether it codified pre-Code law in all respects, including with respect to the narrow issue presented here.

The Elements of Style 4 (E.B. White 2d ed. 1972) (requiring the placement of a comma before a conjunction introducing an independent clause). Best Repair also correctly recognized that, had Congress intended to limit post-petition interest to oversecured consensual lienholders alone, it could easily have said so in any number of ways. Id., at 1082, n.2; cf. Timbers of Inwood, supra 108 S. Ct. at 631 (if Congress meant to compensate undersecured creditors for delay, it would have included language to that effect in §506(b)). Indeed, there is no plausible explanation for the two separate clauses, the "and" separating the clauses, or the comma if, indeed, "provided for under the agreement" is intended to modify the "interest" clause, as well.

The only explanation offered by the court below was its observation that a comma is "often a matter of personal style." A. at 11 (quotation omitted). In so lightly disregarding Congress' words and otherwise inexplicable separation of clauses, however, the court of appeals ignored basic principles of statutory construction. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 574 (1982) (plain words of statute to be followed unless to do so would "'thwart the obvious purpose of the statute'" or produce "absurd and unjust result") (quotation omitted); Garcia v. United States, 469 U.S. 70, 75 (1984) (requiring "extraordinary showing of contrary intentions from [legislative history]" to limit plain meaning of statutory language); United States v.

Naftalin, 441 U.S. 768, 774 & n.6 (1979) (relying on separation of clauses in interpreting meaning of statute, and noting that "while matters like 'punctuation [are] not decisive of the construction of a statute' . . . where they reaffirm conclusions drawn from the words themselves they provide useful confirmation") (citation omitted).

As in Ron Pair, the error of the court below is rooted in a misreading of this Court's holding in Midlantic National Bank v. New Jersey Department of Environmental Protection, supra. According to the First Circuit, that decision requires a court to presume that Congress simply codified pre-Code judicial law, unless something "affirmatively rebuts the initial inference that Congress had no intention, in enacting §506(b), to

change existing law." A. 10. Contrary to that reading, however, this Court has not imposed any unusual burden on Congress to make especially clear an intent to change prior bankruptcy law.

To be sure, Midlantic, as well as this Court's decisions in Kelly v. Robinson, __ U.S. __, 107 S. Ct. 353 (1986) and Timbers of Inwood, supra, recognize the relevance of pre-Code law in construing Code provisions. Midlantic, 474 U.S. at 501; Kelly, 107 S. Ct. at 359-60; Timbers of Inwood, 108 S. Ct. at §64. The principle established by those cases, however, is that the Code should not lightly be read to "silently abrogate[ ]," Kelly, 107 S. Ct. at 359 (emphasis added), well-established pre-Code bankruptcy law -- that is, without "specific provision in the text of the statute" or, failing

that, "any mention in the legislative history." Timbers of Inwood, supra, 108 S. Ct. at 634. Midlantic and Kelly recognize that a court should be especially unwilling to find such a "silent abrogation" where important, independent interests in state law are implicated, as they were in those cases. See Midlantic, 474 U.S. at 502 (recognizing state's interest in protecting "public health and safety" and ruling that Code does not permit bankruptcy trustee to abandon toxic waste sites); Kelly, 107 S. Ct. at 360 (recognizing state's interest in "formulat[ing] and enforc[ing] penal sanctions" and ruling that debtor may not discharge obligation to make restitution payments imposed as part of criminal judgment). Nothing in these cases, however, supports the analysis or the result reached below.

First, there simply was no "silent abrogation" of the prior rule regarding interest. Congress made "its intent specific" by structurally separating the two clauses in §506(b), by using the word "and" between these clauses, and by using a comma. Thus, the Code provides ample "plain textual indication," Timbers of Inwood, supra, 108 S. Ct. 634, that post-petition interest is payable to all oversecured creditors -- that is, whenever there is a "security cushion" from which the interest may be paid. Id. at 631, 632. The court of appeals plainly strained the statutory language to suggest its contrary interpretation.

Second, even if the statutory language were not alone dispositive, this case presents no strong countervailing interest, rooted in

longstanding, independent state (or federal) law, as in Midlantic or Kelly. The issue of post-petition interest is fundamentally a bankruptcy issue. Indeed, to the extent that an important state interest is at play here, it is the Commonwealth's interest in protecting the efficacy of state tax collection statutes, and in ensuring that all revenues properly due and owing are paid into the public fisc.

Finally, and more fundamentally, the First Circuit's "initial inference" that the Code simply codified prior law is undermined by the very breadth and depth of the "overhaul[ ] and modernization" of bankruptcy law Congress intended to accomplish through the Bankruptcy Code. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52-53 (1982); H.R. Rep. 95-595, 95th

Cong., 1st Sess. 3-4 (1977); S. Rep. 95-1106, 95th Cong., 2d Sess. 1 (1978). Certainly, in interpreting the 1978 Code, this Court has employed no mechanistic presumption that Congress meant only to catalogue, and not to revise, existing law. See United States v. Whiting Pools, 462 U.S. 198 (1983).

With respect to the treatment of tax claims in particular, Congress set out expressly to balance the interests of debtors, creditors and taxing authorities, S. Rep. 95-989, 95th Cong., 2d Sess. 14 (1978); S. Rep. 95-1106, 95th Cong., 2d Sess. 2 (1978); see Whiting Pools, supra, 462 U.S. at 210, and apparently chose to place the government on an equal footing with other oversecured creditors for purposes of post-petition interest. In doing so, Congress recognized that, contrary to

pre-Code law that accorded special solicitude to protecting the "expectation interests" of private creditors holding security agreements with the debtor, in fact the government may be an especially disadvantaged creditor, whose debts are the first to be foresaken by a debtor aware "that detection of nonpayment is more difficult for the taxing authority than it is for the supplier or lender, and that an unpaid supplier quickly stops shipping goods, though an unpaid taxing authority is usually unable to take collection action for months". H.R. Rep. 95-595, 95th Cong., 1st Sess. 193 (1977).

Accordingly, even if it is appropriate to consult legislative history in the face of §506(b)'s explicit terms, that history supports

adoption of a rule that treats taxing authorities like other oversecured creditors, so long as a "security cushion," Timbers of Inwood, supra, 108 S. Ct. at 631, is present to justify the payment of interest.[7/] And that history does not support the broad presumption that the Code simply codified all existing law, as suggested by the court below.

In short, the approach taken by the First Circuit distorts traditional statutory construction, gives Midlantic and Kelly an unduly broad sweep, and, by imposing a particularly heavy burden on parties claiming that the Code departed from the earlier law, in effect

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7/ Indeed, the court below could say only that the legislative history concerning §506(b) was "'wholly inconclusive,'" A. 9 (quoting Best Repair, supra). It cited no legislative history supporting its view.

displaces congressional choices and legislates prior law back into effect. Thus, in this case, the court impermissibly disregarded an explicit congressional choice in favor of an earlier judicial rule. This Court should grant certiorari to clarify the principles governing interpretation of the Code, and to correct the erroneous result reached in this case.

C. Plenary Review of This Case is The Most Appropriate Disposition

The legal issue presented here is the same one that will be decided in Ron Pair, and this Court should accordingly grant certiorari or, at a minimum, hold this petition pending resolution of Ron Pair. Because this case involves a Chapter 7 bankruptcy and Ron Pair involves a Chapter 11 proceeding, however, granting plenary review is a

more appropriate course that will eliminate potential uncertainty about the scope of the Court's ruling.

Section 103(a) of the Code expressly makes §506(b) applicable to cases arising under Chapters 7, 11, 12 and 13,[8/] but some courts, including the bankruptcy court in this case, have suggested that the kind of bankruptcy proceeding involved may be relevant in interpreting the scope of §506(b). See A. 59-60; In re Venable, 48 B.R. 853, 855 (Bankr. S.D.N.Y. 1985); cf. In re Russo, 63 B.R. 335 (Bankr. D. Mass 1986). Similarly, other decisions construing different administrative

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8/ That provision states that, with exceptions not relevant here, "chapters 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title." Section 506, in turn, is part of Chapter 5 of the Code.

provisions in Chapter 5 of the Code (11 U.S.C. §§501, et seq.) suggest -- even in the face of §103(a) -- that the kind of bankruptcy proceeding involved may be a relevant consideration. See, e.g., United States v. Whiting Pools, supra, 462 U.S. at 208-209, n.17 (despite terms of §103(a), "[w]e express no view on the issue whether §542(a) [of the Code] has the same broad effect in liquidation or adjustment of debt proceedings [as in reorganization proceedings]"); In re Berry, 30 B.R. 36 (Bankr. E.D. Mich. 1983) (despite terms of §103(a), lien avoidance provisions in §522 of Code do not apply to proceedings under chapter 13). Petitioner believes that there is no justification for interpreting §506(b) differently according to which chapter of the Code is involved. Deciding the question presented here in

the context of both a Chapter 11 and a Chapter 7 bankruptcy proceeding will permit this Court to eliminate potential ambiguity about the reach of its ruling.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari be granted in this case. Alternatively, petitioner requests that this petition for certiorari be held pending final disposition of United States v. Ron Pair.

Respectfully submitted,

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Dated: April 26, 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 87-1964

IN RE NEWBURY CAFE, INC.,
d/b/a 29 NEWBURY

Debtor.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff, Appellant,

v.

NEWBURY CAFE, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED
STATES DISTRICT COURT

FOR THE DISTRICT OF
MASSACHUSETTS

[Hon. A. David Mazzone,
U.S. District Judge]

Before

Coffin, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Pettine,* Senior District Judge.

Leonard M. Goldberg, Massachusetts Department of Revenue, Legal Bureau, with whom Michael E. Porter, Chief, Legal Bureau, James M. Shannon, Attorney General and Jane S. Schacter, Assistant Attorney General, were on brief for appellant.

Christopher W. Parker with whom Hinckley, Allen, Snyder & Comen was on brief for appellee.

MARCH 8, 1988

* Of the District of Rhode Island, sitting by designation.

ALDRICH, Senior Circuit Judge. In this case we are asked to decide whether a so-called oversecured taxing authority may recover from a bankrupt's estate interest on its debt accruing during the bankruptcy proceedings. Plaintiff Massachusetts Department of Revenue ("DOR") holds a statutory lien, Mass. G.L. c. 62C, §50, on the property of debtor Newbury Cafe, Inc. ("Newbury"). The value of the property subject to the lien exceeds the sum of the principal amount of the tax debt plus pre-petition interest, and DOR sought in the bankruptcy court a ruling that section 506(b) of the Bankruptcy Code of 1978, as amended in 1984 (11 U.S.C. § 506(b)), entitled it to interest which accrued on its debt after the filing of the petition.

The bankruptcy judge,

declining to follow the ruling of a fellow judge, In re Angelo Russo, 63 B.R. 335 (Bkrtcy. D. Mass. 1986), ruled in favor of Newbury's trustee. The district court affirmed, construing section 506(b) consistently with judicial decisions prior to the Code, hereinafter pre-Code law, that restricted post-petition interest to those oversecured creditors whose liens were the product of a pre-petition bargain. We affirm.

The dispute derives from the unfortunate grammar of section 506(b), which, with our additions of emphasis, provides,

> To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such

> claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The primary question is whether the emphasized proviso clause modifies all the words beginning with "interest," or, instead, modifies only those words between the two emphasized expressions, thereby allowing interest without exception. The majority of courts construing this section have held that the initial comma insulates the word (and the concept of) "interest" from the effect of the proviso clause, with the result that interest is allowed to every oversecured creditor, non-consensual source of the lien notwithstanding. In re Best Repair Company, Inc., 789 F.2d 1080 (4th Cir. 1986) (collecting cases).

The allowance of post-petition interest to a creditor is an exception to a fundamental tenet of bankruptcy law, which, in effect, freezes the affairs of the debtor at the time of the petition. Under the 1978 Bankruptcy Code, the freeze as to accrual of interest is accomplished by section 502(b)(2), disallowing claims for unmatured interest. Pre-Code law held post-petition interest generally unrecoverable. In re Boston & Maine Corp., 719 F.2d 493, 496 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984); City of New York v. Saper, 336 U.S. 328, 332 (1949); Sexton v. Dreyfus, 219 U.S. 339, 344 (1911). The courts recognized three exceptions. Interest might accrue: (1) where it eventuated that the debtor is in fact solvent; (2)

where securities, held by the creditor as security for the debt, produced income after the filing of the petition; and (3) where the value of the secured creditor's contracted security was sufficient to satisfy both principal and interest due on the secured claim. Boston & Maine, 719 F.2d at 496 and cases cited; In re Lykens Hosiery Mills, 141 F. Supp. 895, 897 (S.D.N.Y. 1956).

As we observed in Boston & Maine, the existence and scope of the three exceptions was a function of the equitable powers of the bankruptcy court, and, in light of equitable considerations, we there joined four other circuits in holding that the third exception extended only to claims secured by bargained-for or consensual liens. See In re Kerber Packing, 276

F.2d 245, 247-48 (7th Cir. 1960); United States v. Mighell, 273 F.2d 682, 684 (10th Cir. 1959); United States v. Bass, 271 F.2d 129, 131 (9th Cir. 1959); United States v. Harrington, 269 F.2d 719, 723-4 (4th Cir. 1959). No court of appeals took a contrary position. Our question is whether section 506(b)'s codification removed that limitation.

DOR goes so far as to tell us that the limitation-removal language is "clear and unambiguous." If anything seems clear, it is that that is not so. We accordingly look to legislative history, and to what seems the more natural, and the more reasonable, in light of the Code as a whole.

We start with the fact that even DOR's leading authority, Best Repair Co., conceded that the legislative

history is "wholly inconclusive." 789 F.2d at 1082. In light of the uniform and extensive pre-Code law, that void is a serious obstacle for DOR, particularly in a bankruptcy matter. In Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), the Court said, at 501,

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. [citation omitted] The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

These words were quoted and relied on as a, if not the, ground for disagreeing with Best Repair in In re Ron Pair Enterprises, Inc., 828 F.2d 367, 370,

372-73 (6th Cir. 1987)[1/]. We find that opinion persuasive. Nothing affirmatively rebuts the initial inference that Congress had no intention, in enacting section 506(b), to change existing law. Instead, it is to be noted that the other two exceptions to post-petition interest stated in Boston & Maine were preserved intact. See sections 552(b) and 726(a)(5); Boston & Maine, 719 F.2d at 496. It is only reasonable to assume

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1/ In this matter of importance to the bankruptcy bar the trustee's brief fails to cite In re Ron Pair Enterprises, though directly in point and published four months before, and rests its argument (apart from a 70 line quotation from our Boston & Maine opinion) on a bankruptcy decision from another circuit without noting that it had been reversed. We trust that the bankruptcy trustee will bear the worth of this brief in mind and the argument based thereon, when it determines its value to the estate.

that the drafters of the Code were familiar with existing law, and would not, without good cause, break up its symmetry.

In this circumstance DOR is reduced to pinning its hopes on one, what one court has termed "capricious," comma. See In re Dan-Ver Enters, Inc., 67 B.R. 951 (W.D. Pa. 1986). A comma, often a matter of personal style, is a very small hook on which to hang a change in the law of substantial proportions. Especially should this be so when the law was so fully supported for the reasons given in Boston & Maine. We need not repeat them, finding ourselves in agreement with In re Ron Pair Enterprises, Inc., which, too, needs no elaboration.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 87-1964

IN RE NEWBURY CAFE, INC.,
d/b/a 29 NEWBURY,

Debtor,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff, Appellant,

v.

NEWBURY CAFE, INC.

Respondent, Appellee.

JUDGMENT

Entered: March 8, 1988

This cause came on to be heard on appeal from the United States District

Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/
Francis P. Scigliano
Clerk.

[cc: Messrs Goldberg and Parker]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEWBURY CAFE, INC.
d/b/a 29 NEWBURY

CIVIL ACTION
87-1382-MA

STEPHEN J. GRAY,
TRUSTEE IN BANKRUPTCY

VS.

PATRIOT BANK, ET AL.

MEMORANDUM AND ORDER

Mazzone, D.J. September 21, 1987

This appeal from the Bankruptcy Court is brought by the Commissioner of the Massachusetts Department of Revenue ("Revenue"). The appeal challenges the ruling of the Bankruptcy Court that section 506(b) of the Bankruptcy Code ("the Code") did not change the law that existed prior to the adoption of the Code, thereby denying the request of

Revenue for post-filing interest on its oversecured claim against the debtor, Newbury Cafe, Inc. ("Newbury").

On October 9, 1975, Newbury filed a Chapter 11 petition of the Bankruptcy Code, 11 U.S.C. Section 101 et seq. That action was later converted to a Chapter 7 proceeding. On June 6, 1986, the Bankruptcy Court approved the sale of the assets of Newbury for $305,000. Approximately $203,404.38 of that sum remains, less amounts to be paid by the Trustee in Bankruptcy, Stephen J. Gray, for utility bills. On September 26, 1986, the Trustee filed a complaint for a Determination of Secured Claims and Allocation of Sale Proceeds to distribute the proceeds between conflicting and allegedly secured claims. Three taxing authorities made

claims to the proceeds, of which only one, Revenue, claimed postpetition interest on its secured claim of $52,508.88 at an 18% interest rate. As of June 13, 1987, this claimed interest amounted to $15,846.89, with interest accruing at $25.89 per diem.

In a thorough opinion, dated April 16, 1987, Chief Judge Gabriel denied Revenue's request for post-petition interest. This opinion conflicts with an equally well-reasoned opinion by Judge Lavien in In Re Russo, 63 B.R. 335 (Bkrtcy. D. Mass. 1986). The only issue presented is whether Chief Judge Gabriel's opinion is supported by the evolving law of bankruptcy. The First Circuit has yet to rule on this issue. Since the issue is a pure question of law (i.e., the proper interpretation of

section 506(b)), the Court must determine the issue de novo. Liebowitz v. Columbia Packing Co., 56 B.R. 222 (D. Mass. 1985), aff'd, 802 F.2d 439 (1st Cir. 1986).

Section 506(b) of the Code concerns the recovery allowed oversecured creditors. It reads:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose.

The meaning of the comma following the phrase "interest on such claim" is the focus of this case. Newbury argues that the phrase should be read along with the following one, thereby engrafting the

limiting phrase "under the agreement under which the claim arose" onto the phrase concerning interest. Interest, then, would be provided to an oversecured party only when the security interest is consensual and makes provision for interest. Revenue, on the other hand, interprets the comma as creating a separation between the phrase concerned with interest from that establishing a consensual right to fees, costs, and charges, so that the section provides interest to oversecured parties in both consensual and nonconsensual situations. Both sides point to ample case authority to support their positions, although a majority of courts appear to support Revenue's position. See, e.g., In Re Busone, 71 B.R. 201, 203 (Bkrtcy. E.D.N.Y. 1987) ("Although

the question is still not entirely free from doubt, the current weight of authority is to the effect that section 506(b) authorizes the allowance of post-petition interest to all oversecured creditors, regardless of whether the creditor's lien arises from an agreement or, as in the present case, by operation of statute").

One of the clearest and most influential expositions of section 506(b) in support of Revenue's position is contained in the Fourth Circuit's opinion in Best Repair Co., Inc. v. United States, 789 F.2d 1080 (4th Cir. 1986).[1/] The Fourth Circuit found

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1/ That decision was the basis for the ruling of Bankruptcy Judge Lavien in In Re Russo in coming to the opposite conclusion of Judge Gabriel in the instant case.

that the language of 506(b) established a distinction between interest and the other claims that could be made by an oversecured creditor:

> The phrase "interest on such claim" is set off by commas, and the following phrase is introduced by "and any". The effect of this usage is to make "interest on such claim" a separate and distinct clause to which "provided for under the agreement" does not apply. If Congress had wanted the agreement proviso to limit "interest on such claim" to consensual claims, it could . . . easily have done so by listing seriatim and in parallel from the different items an over-secured creditor can recover subject to an agreement. Though Congress could have more clearly separated the interest clause from the agreement clause, we think that the natural meaning of its chosen words is to permit post-petition interest on non-consensual oversecured claims.

Id. at 1082 (footnotes omitted).

In footnotes, the Court discussed alternative formulations of 506(b) Congress could have chosen that would have clarified its meaning to demonstrate the probable intention of Congress. For instance, the Court noted that had Congress merely eliminated one comma and written the section to read "there shall be allowed to the holder of such claim, interest on such claim and reasonable fees, costs and charges provided for under the agreement under which such claim arose," the section would clearly prohibit postpetition interest unless it is consensual. Further, had the phrase "provided for under the agreement" been placed before the phrase on interest, it, too, would have added support to the argument that an agreement on interest is necessary.

Id. at 1082, n.2. Congress did not do that, reasons the Court, thus interpreting the section as if a clear separation was intended, in effect reading into the section the bracketed material: "there shall be allowed to the holder of such claim [i] interest on such claim, and [ii] any reasonable fees, costs or charges . . ." Id. n.3. Since the Court found the legislative history inconclusive, this latter reading was adopted because "[t]here is, therefore, no reason to depart from the natural import of the language itself." Id at 1082.

Two points can be made about the Court's opinion in Best Repair. First, although the Court does a thorough job of explaining alternative ways that Congress may have expressed itself in

writing the section, it says little about what Congress actually did mean by the construction it chose. Secondly, the Court could have highlighted one other grammatical argument that it made elsewhere in the opinion. If the interpretation advanced by the debtor in Best Repair is accepted, then the words "on such claims" following "interest" become superfluous. As it stands now, the interest phrase is not merely separated by a comma, it is also separated by the use of the words "on such claim" which are repeated in the following phrase concerning reasonable fees, costs, and charges. In other words, Newbury's argument would be stronger if the sentence merely read "interest, and any reasonable fees, costs or charges...," eliminating only

the words "on such claim" following the word "interest". This would have the grammatical result of limiting the word "reasonable" to modifying the terms fees, costs and charges only, and would add support to the argument that the entire sentence is subject to the qualifying phrase "agreement under which such claims arose."[2/]

Another court interpreted the language of 506(b) in light of its

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2/ The Court in Best Repair made a similar argument in its opinion. Noting that the district court cited 3 Collier on Bankruptcy section 506.05 (L. King 15th ed. 1985) which suggested that "interest on such claim" is separated by a comma from the [agreement phrase]...to make clear that interest was to be allowed only to the extent it accrued on the claim (as opposed to any other amount)" the Court of Appeals argued that the above purpose "is sufficiently served by qualifying 'interest' with 'on such claim.'" 789 F.2d at 1082.

legislative history to decide in favor of the position expounded by Newbury. In In Re Dan-Ver Enterprises, 67 B.R. 951, 955 (W.D. Pa. 1986), the District Court noted that, as originally drafted, section 506(b) read:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section is greater than the amount of such claim, there shall be allowed to the holder of such claim, to the extent collectible under applicable law interest on such claim, and any reasonable fees, costs, or charges provided under the agreement under which such claim arose.

Id. at 955, quoting H.R. 8200, 95th Cong., 1st Sess. (1977) (emphasis added by the court). The Court, noting in its opinion that the underscored language was deleted from the final version of the section, interpreted this

legislative history as ultimately adding support to the position advanced by Newbury. As the court wrote:

> The bankruptcy court interprets the phrase "to the extent collectible under applicable law" as permitting post-petition interest on nonconsensual liens. Based on this interpretation, the judge implies that deletion of this language by Congress indicates congressional intent that such interest not be permitted on nonconsensual liens. On the contrary, "applicable law," which apparently refers to the pre-Code law previously discussed, would not permit postpetition interest on nonconsensual liens. Therefore, deletion of the aforementioned phrase would arguably imply the opposite; that is, Congress intended to permit recovery of postpetition interest regardless of whether a lien is consensual or nonconsensual.
>
> The reasoning behind the delegation does not support this latter implication, however...[Legislative history suggests that] Congress was concerned that the phrase "to

> the extent collectible under applicable law", which lies before the insidious comma, would contradict the phrase "provided for under the agreement under which the claim arose," which lies after the comma and would thereby obviate any written provision for attorneys' fees. [The argument that the comma was meant to separate interest from fees, costs and charges such that "agreement under which such claims arose" only modifies the latter three must be rejected.] Congress...could not have viewed this comma as causing this separation [because]...the phrase "to the extent collectible under applicable law" would have no bearing on the provision for an agreement under which such claim arose," because the comma would also separate 506(b) so that the "applicable law" phrase would modify the interest provision only. If Congress had drafted 506(b) with this intent in mind, the reasoning provided for the deletion of the applicable law phrase would be rendered moot.

Id. at 955-56. Thus, concluded the Court, Congress did not intend that the

requirement of an agreement apply only to fees, costs and charges, "just as the 'applicable law' provision would not have applied only to interest," id. at 956, thus leaving intact pre-Code law that distinguished between consensual and nonconsensual liens and rejected the award of post-petition interest to non-consensual lien creditors.[3/]

As the above discussion demonstrates, there is judicial disagreement as to the proper

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3/ Other courts dispute this latter conclusion, however, For instance, the Court in In Re Loveridge Machine & Tool Co., Inc., 36 B.R. 159, 162 n.4 (Bkrtcy. D. Utah 1983), focusing on the scant legislative history contained in the House and Senate Reports, noted that some have argued it was Congress' intent to codify current law (a phrase used in the reports) only with respect to fees, costs and charges. See also In Re Russo, 63 B.R. 335, 337 (Bkrtcy, D. Mass. 1986).

interpretation of the language of section 506(b). To determine an appropriate outcome in such a situation, the Court must closely examine the relevant policies underlying section 506(b). In conducting this analysis, the Court must bear in mind the general policies underlying the bankruptcy law itself. As one bankruptcy court noted, "[t]he two major purposes of the Code are to provide debtors with a fresh start' and to provide for the fair and equitable distribution of assets to creditors." In Re Morrissey, 37 B.R. 571, 573 (Bkrtcy. E.D. Va. 1984), citing 1 Bkr.L.Ed. Summary section 1.1 (1979).

Some notion of equity between governmental and private creditors seems to be the major policy argument in support of Revenue's position. As one

court noted, "[t]he [government] should be no better off nor worse off then any other secured creditor. The [government] deserves equal treatment when compared to any other oversecured creditor." In Re Gilliland, 67 B.R. 410, 411 (Bkrtcy. N.D. Tex. 1986).[4/] Although equating the positions of the government with that of private creditors has some surface plausibility, closer analysis reveals the basic flaw in the analogy. The practical effect of accepting the premise of Revenue's argument -- that all oversecured creditors should be allowed postpetition interest on their claims -- would be the more

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4/ This opinion was attacking the distinction between consensual and non-consensual lienholders discussed more fully below.

rapid depletion of the bankrupt's estate. Regardless of the other results of and rationales behind this fact, one result is clear -- unsecured creditors and others with claims against the estate (to include the debtor himself, in the event that there is a surplus in the estate after distribution) will be less likely to obtain a fair return. Such a result seems to cut against the Code's policy of equitable treatment for both debtor and creditor alike. As one court noted, "[t]o allow a nonconsensual creditor to absorb the majority of the Debtor's remaining assets, to the detriment of other nonconsensual creditors, merely for the purpose of awarding post-petition interest, is not at all equitable." Matter of Dan-Ver Enterprises, Inc., 60 B.R. 568, 570-71

(Bkrtcy. W.D. Pa. 1986), aff'd, In Re Dan-Ver Enterprises, Inc., 67 B.R. 951.

Advocates of Revenue's position also argue that the granting of postpetition interest would not be inequitable with respect to the debtor himself. "To foster the policy of providing the debtor with a fresh start, the general rule is that unmatured interest at the time of the filing of the petition is not allowed as a part of a claim against the debtor's estate. However, an allowance of postpetition interest on an oversecured claim does not have a 'chilling effect' on the debtor and provides a distribution to the creditor of the full and proper amount of its claim." In Re Morrissey, 37 B.R. 571, 573 (Bkrtcy. E.D. Va. 1984) (citations omitted). Such an argument, although

again not without some appeal at first blush, nevertheless ignores the effect on the debtor of reducing the estate by the granting of postpetition interest while assuming that a distribution without such interest to the creditor somehow represents an inappropriate or unfair settlement of his claims. This also appears to undercut the equitable purposes underlying the Code.

Other policy considerations militate in favor of the debtor Newbury's position here. These seem grounded upon a simple fact -- that the minor change in language adopted by Congress in the recent revisions of the Bankruptcy Code certainly meant to convey no shift in meaning of those provisions themselves. As the Bankruptcy Court put it so forcefully in In Re Churchfield, 62 B.R.

399 (Bkrtcy. E.D. Mich. 1986), the policies motivating the Bankruptcy Act, the precursor to the Bankruptcy Code, were strong and long-standing ones. For instance, the Court in Churchfield relied heavily on the examination of these policies by the First Circuit in In Re Boston & Maine Corp., 719 F.2d 493 (1st Cir. 1983), where the circuit court drew a clear distinction between consensual and nonconsensual security interests under the Bankruptcy Act:

> [One of the exceptions to the rule against the payment of post-petition interest is] where the amount of the secured creditor's security is sufficient to satisfy both the principal and the interest due on the secured claim...Those cases in which the courts have applied [this] third exception...have generally involved mortgages, trust deeds, pledges or conditional sales contracts. In all of these circumstances, the

creditor's security interest arises from a voluntarily executed agreement between the debtor and the creditor. The two parties have bargained with reference to a specific security with the expectation that the creditor may sell this security and realize the entire amount of the outstanding obligation, including interest accrued to the date of payment. To deny such a creditor postpetition interest, when the amount of the security is sufficient to cover both the principal and interest due, would undermine the faith of lenders in the efficacy of credit arrangements. Such a loss of confidence could result in a curtailing of the free flow of capital in our economy. Thus, granting of postpetition interest to...holders of contractual liens satisfies the expectations of the parties and strikes an equitable balance between the creditors and the debtors...[Therefore a] meaningful distinction can be drawn between contractual liens...and statutory liens...A statutory lien depends for its existence solely on a legislative act creating the lien...No bargaining takes place between the

> debtor-taxpayer and the taxing entity granted a lien; the lien cannot be classified as voluntary.
>
> Further, the payment of interest which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device...In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. Such creditors are not innocent bystanders...[t]o penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity.

Id. at 496-97 (citations omitted, emphasis supplied), cited in In Re

Churchfield, 62 B.R. at 402.[5/] Another court expressed the reasons behind the pre-Code rule denying postpetition interest to nonconsensual oversecured creditors more succinctly:

> Two reasons were given for this rule:
> (1) interest payments are penalties or damages assessed against the debtor for his detention of the creditor's money, and therefore it would be unjust to allow the creditor to recover such penalties or damages from other creditors who were not to blame for the detention; and

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5/ The Bankruptcy Court in In Re Russo attempted to distinguish the Boston & Maine case by noting that it "was decided under the old [Bankruptcy] Act which had no specific provision on this point." 63 B.R. at 336. The court added that the balance of equities was different in the case as well, since it "dealt with the reorganization of a railroad, naturally involving great public concern and requiring the balancing of the town's right or need for the interest on its real estate taxes with the effect the payment of that interest would have had on reorganizing the railroad." Id. at 336-37.

> (2) the bankruptcy court itself, not the debtor, detains the money after a petition is filed.

67 B.R. at 953.

Lastly, the opinion of the court in In Re Churchfield underscored an obvious but helpful point that supports following the above rationales in denying postpetition interest. Under the old Bankruptcy Act, observed the court, all five circuit courts which had considered the postpetition interest issue had found that such interest was not payable. Judge Spector concluded from this that

> [w]e cannot believe that Congress would overrule an unbroken line of five court of appeals decisions on an issue involving the federal fisc without even one word of explanation of its intention. Likewise, we cannot find that the mere placement of a comma under the circumstances

> evidences such an intention. Therefore, we agree with those courts which found that Sec. 506(b) creates no material change from prior practice, and are persuaded to follow the nearly unbroken line of cases which hold that creditors holding nonconsensual liens are not entitled to post-petition interest thereon in bankruptcy cases.

Id. at 403.

I, too, am persuaded that Congress meant no such radical change in policy by the placement of a solitary unexplained comma.

Accordingly, I conclude Chief Judge Gabriel was correct in denying Revenue's motion for postpetition interest on its oversecured claim. The order of the Bankruptcy Court is affirmed.

SO ORDERED

/s/
A. David Mazzone
United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEWBURY CAFE, INC.
d/b/a 29 NEWBURY

STEPHEN J. GRAY, Trustee in Bankruptcy

v. C.A. No. 87-1382-MA

PATRIOT BANK, ET AL.

JUDGMENT

MAZZONE, D.J.

In accordance with the Court's memorandum and order dated September 21, 1987 affirming the order of the Bankruptcy Court in the above entitled action, it is hereby ORDERED judgment for the appellee.

By the Court,

/s/
Helen M. Costello
Deputy Clerk

September 25, 1987

APPENDIX E

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MASSACHUSETTS

In re:	)	Chapter 7
NEWBURY CAFE, INC., d/b/a 29 Newbury Debtor	)	Case No. 85-01113-JG
STEPHEN J. GRAY, TRUSTEE in BANKRUPTCY of NEWBURY CAFE, INC., d/b/a 29 Newbury Plaintiff	)	Adv. No. 86-1394
v.	)	
PATRIOT BANK, UNITED STATES OF AMERICA, JANE BRODEY AND COMMONWEALTH OF MASSACHUSETTS Defendants	)	

MEMORANDUM

INTRODUCTION

On October 9, 1985, Newbury Cafe, Inc. (the "Debtor" or "Newbury Cafe")

filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Approximately ten months later, on July 30, 1986, the Chapter 11 case was converted to a case under Chapter 7. The conversion followed this Court's approval of a sale of all the estate's assets for $305,000 to George Lewis, Jr., the highest bidder in a sealed bid sale conducted by the Court.

Following the sale, on September 26, 1986, the Trustee filed a Complaint for Determination of Secured Claims and Allocation of Sale Proceeds in an attempt to properly allocate the proceeds from the sale between conflicting and allegedly secured parties. On January 5, 1987, the Court conducted a hearing to determine the validity, nature and extent of security

interests and liens. At the hearing, the Trustee's counsel reported that settlements had been reached with all the defendants except the Commonwealth of Massachusetts, Department of Revenue (the "DOR") and Jane Brodey. The matter now before the court involves the DOR. Two issues must be addressed: 1) whether the DOR is entitled to post-petition interest on its allowed secured claim; and 2) if so, whether the applicable rate of interest is the 18 percent per annum rate established by Massachusetts law. Cf. M.G.L. c. 62C, §32.

FACTS

Prior to the filing of the Chapter 11 petition, the DOR had assessed meals and withholding taxes against the Debtor, and it had recorded written

"Notices of Massachusetts Tax Lien" with the Suffolk County Registry of Deeds, the Secretary of State for the Commonwealth of Massachusetts and the Boston City Clerk. On September 17, 1986, the DOR filed a Proof of Claim for the unpaid meals and withholding taxes on which it stated: "[f]or purposes of Section 506(b) of the Bankruptcy Code, post-petition interest may be payable."

In its post-trial memorandum, the DOR asserts that its secured tax claim consists of tax in the amount of $52,508.88 and pre-petition interest at the 18 percent rate for a total claim of $65,739.25. Also, according to the DOR, the Trustee does not dispute the amount of its secured tax claim except for January 1984 meals taxes. If the Court allows the DOR post-petition interest on

its secured claim at the 18 percent rate, the DOR notes that post-petition interest on the tax of $52,508.88 is $11,963.39 as of January 14, 1987. Interest continues to accrue at a per diem rate of $25.89.

DISCUSSION

In the instant case, the Trustee does not dispute that the taxes in question were assessed against the Debtor, that the DOR made demand for payment of the tax and properly recorded its notices of lien and consequently that under state law the tax claim against Newbury Cafe is secured by a valid lien on all the Debtor's property, which lien is enforceable against subsequent mortgagees, pledgees, purchasers and

judgment creditors.[1/]

1/ Section 50 of M.G.L. c. 62 governs the creation and perfection of Massachusetts tax liens. It provides in relevant part:

> (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, including any interest; additional amount, addition to tax, assessable penalty or forfeiture, together with any costs that may accrue in addition thereto, shall be a lien in favor of the commonwealth upon all property and rights to property, whether real or personal, belonging to such person. The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed or deemed to be assessed is satisfied. Said lien shall in any event terminate not later than six years from the date it was created.
>
> (b) The lien imposed by this section shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the commissioner: (1) With respect to real property or fixtures, in the registry of deeds of the county where such property is situated, and (2) With respect to personal property, in the office in which a security or financing statement or notice with respect to the property

However, the Trustee does dispute the DOR's claim for post-petition interest. Resolution of that dispute involves an analysis of section 506(b) of the Bankruptcy Code. Section 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and

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[footnote continued]
1/ would be filed in order to perfect a mortgage or comparable nonpossessory security interest in tangible personal property belonging to the person named in the relevant notice. The filing of a notice of any such lien or of a waiver or release of any such lien shall be received and registered or recorded without payment of any fee.

M.G.L. c. 62, §50(a) and (b).

> any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. 506(b).

Under the Bankruptcy Act, all five circuits that considered the issue of whether oversecured tax claimants are entitled to post-petition interest, including the United States Court of Appeals for the First Circuit, held that such claimants were not entitled to post-petition interest. According to Judge Cohill, in In re Dan Ver Enterprises, Inc., 67 B.R. 951 (W.D.Pa. 1986), two reasons were promulgated for that holding:

> (1) interest payments are penalties or damages assessed against the debtor for his detention of the creditor's money, and therefore it would be unjust to allow the creditor to recover such penalties or damages from other creditors who were not to blame for the detention; and (2) the

> bankruptcy court itself, not the debtor, detains the money after a petition is filed.

67 B.R. at 953 (citations omitted). In the First Circuit, the Court of Appeals in In re Boston & Maine Corp., 719 F.2d 493 (1st Cir. 1983), cert. den., 466 U.S. 938 (1984), explained the rationale as follows:

> Despite the general prohibition on the payment of postpetition interest, three exceptions have been developed by the federal courts. Interest may accrue: (1) where the bankrupt ultimately proves to be solvent; (2) where securities, held by the creditor produced income after the filing of the petition; and (3) where the amount of the secured creditor's security is sufficient to satisfy both the principal and interest due on the secured claim.
>
> * * *
>
> Those cases in which courts have applied the third exception, permitting postpetition interest to accrue, have

generally involved mortgages, trust deeds, pledges or conditional sales contracts. In all of these circumstances, the creditor's security interest arises from a voluntarily executed agreement between the debtor and the creditor. The two parties have bargained with reference to a specific security with the expectation that the creditor may sell this security and realize the entire amount of the outstanding obligation, including interest accrued to the date of payment. To deny such a creditor postpetition interest, when the amount of the security is sufficient to cover both the principal and interest due, would undermine the faith of lenders in the efficacy of credit arrangements. Such a loss of confidence could result in a curtailing of the free flow of capital in our economy.

* * *

A meaningful distinction can be drawn between contractual liens, such as a mortgage or deed of trust, and statutory liens, such as Cambridge's perfected tax lien. A statutory lien depends for its existence solely on a legislative act creating the lien in

specified circumstances. No bargaining takes place between the debtor-taxpayer and the taxing entity which is granted a lien; the lien cannot be classified as voluntary.

Further, the payment of the interest, which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device assuring the collection of delinquent taxes. In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. Such creditors are but innocent bystanders; they could have done nothing to effect the prompt payment of taxes and avoid the imposition of postpetition interest. To penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity.

719 F.2d 496-97 (emphasis supplied)(citations and footnotes omitted).

In the instant proceeding, the Trustee argues that pre-Code law compels the conclusion that the DOR, as a non-consensual oversecured creditor, is not entitled to post-petition interest. The Trustee interprets the language of section 506(b) to provide that the phrase, "agreement under which such claim arise," applies equally to the phrases "interest of such claim" and "any reasonable fees, costs or charges," regardless of the comma interposed between the two phrases.

The DOR, relying on In re Russo, 63 B.R. 335 (Bankr. D. Mass. 1986), maintains that the qualifying language, "provided for under the agreement under which such claim arise," applies only to "any reasonable fees, costs, or charges," by virtue of the comma following "the amount of such claim" and

applicable rules of statutory construction. Accordingly, the DOR argues that a distinction between consensual and nonconsensual liens with respect to post-petition interest is invalid under the Bankruptcy Code.

The divergent views of the Trustee and the DOR are shared by courts considering the issue with respect to oversecured nonconsensual lien claimants. Compare In re Best Repair Company, Inc., 789 F.2d 1080 (4th Cir. 1986) (post-petition interest to oversecured nonconsensual lienholders allowed); In re Gilliland, 67 B.R. 410 (Bankr. N.D. Tex. 1986) (same); In re Russo, 63 B.R. 335 (Bankr. D. Mass. 1986) (same); In re Henzler Manufacturing Co., 55 B.R. 194 (Bankr. N.D. Ohio 1985) (same); In re Morrissey, 37 B.R. 571 (Bankr. E.D. Va. 1984)

(same); In re Loveridge Machine & Tool, Inc., 36 B.R. 159 (Bankr. Utah 1983) (same); In re Hoffman, 28 B.R. 503 (Bankr. D. Md. 1983) (same); In re Bormes, 14 B.R. 895 (Bankr. D.S.D. 1981) (same); In re Busman, 5 B.R. 332 (Bankr. E.D.N.Y. 1980) (same) with In re Dan-Ver Enterprises, Inc., 67 B.R. 951 (W.D. Pa. 1986) (post-petition interest to over-secured nonconsensual lienholders not allowed); In re Churchfield, 62 B.R. 399 (Bankr. E.D. Mich. 1986) (same); In re Venable, 48 B.R. 853 (S.D.N.Y. 1985) (same); In re Trent, 42 B.R. 279 (Bankr. W.D. Va. 1984) (same). Cf. In re Colegrove, 771 F.2d 119 (6th Cir. 1985); In re Romano, 51 B.R. 813 (Bankr. M.D. Fla. 1985); 3 L. King, Collier on Bankruptcy ¶506.05 (15th ed 1986) ("Post-petition interest, fees, costs and charges are not allowable under section

506(b), notwithstanding the existence of adequate collateral, in the absence of any contractual entitlement thereto. There is a split in authority as to whether a statutory entitlement suffices for the purpose of section 506(b).") The reasoning used by courts to reach such contradictory results is highlighted in two recent bankruptcy court cases: In re Churchfield, 62 B.R. 399 (Bankr. E.D. Mich. 1986) and In re Russo, 63 B.R. 335 (Bankr. D. Mass 1986).

In In re Russo, Judge Lavien noted that the leading First Circuit case addressing the issue under the Bankruptcy Act, In re Boston & Maine Corp., 719 F.2d 493 (1st Cir. 1983), involved a balancing of equities, a task made easy by the absence in the Bankruptcy Act of a section comparable to section 506(b) of the Bankruptcy Code.

Accordingly, Judge Lavien declined to give weight to the case, following the Fourth's Circuit grammatical analysis of section 506(b) in United States v. Best Repair Company, Inc., 789 F.2d 1080 (4th Cir. 1986), instead. He stated that in the absence of some definitive legislative history, "[t]he specific wording of the new 11 U.S.C. Sec. 506(b), given the natural import of the language itself, supports the view that seems to be held by a majority of the courts that have considered the issue. Namely, under the Code, no distinction is made between consensual and statutory liens as to interest which is to be paid so long as there is an excess of collateral." In re Russo, 63 B.R. at 337.

In contrast to Judge Lavien, Judge Spector, in In re Churchfield, 62 B.R.

399 (Bankr. E.D. Mich. 1986), emphasized cases deciding the issue under the Bankruptcy Act, particularly In re Boston & Maine Corp., 719 F.2d 493 (1st Cir. 1983). He stated:

> Before there was a Bankruptcy Code there was a Bankruptcy Act. Many of the issues courts now struggle over were fought and resolved decades ago. If Congress disapproved of those decisions, it had the opportunity in 1978 to undo them in the Bankruptcy Code. . .
>
> * * *
>
> All five circuits of the Courts of Appeals which were called upon to decide whether the Bankruptcy Act provided for postpetition interest to be paid to fully secured tax lien claimants held that it did not.
>
> * * *

> We cannot believe that Congress would overrule an unbroken line of five court of appeals decisions on an issue involving the federal fisc without even one word of explanation of its intention. Likewise, we cannot find that the mere placement of a comma under the circumstances evidences such an intention. Therefore, we agree with those courts which found that §506(b) creates no material change from prior practice, and are persuaded to follow the nearly unbroken line of cases which hold that creditors holding nonconsensual liens are not entitled to post-petitions interest thereon in bankruptcy cases.
>
> In re Churchfield, 62 B.R. at 401, 403.

The Court has carefully considered the divergent views so ably articulated by Judge Lavien and Judge Spector and concludes that the award of post-petition interest to oversecured nonconsensual lienholders is not mandated under the Bankruptcy Code. Accordingly, the Court need not address

the question regarding the applicable rate of interest.

The Court is chagrinned by the fact that its decision creates a split of opinion within the District of Massachusetts, but feels compelled to follow its philosophical convictions in an area where there is clear ambiguity and with respect to what the First Circuit described as "notions of equity." Although not determinative of the decision, the Court observes that the instant case, unlike the Russo case, is a Chapter 7 case. Here, there will be no opportunity for trade creditors to continue to do business with the debtor thereby mitigating, at least to some small degree the losses occasioned by their association with a bankrupt. In a Chapter 7 case like this one,

creditors get one and only one dividend, although that dividend may be paid in installments. Despite the differences between Russo and the instant case, however, the Court reiterates that it does not believe that section 506(b) of the Bankruptcy Code which applies equally to Chapter 7 and Chapter 11 cases, requires preferential treatment for oversecured, nonconsensual lien creditors with respect to the payment of post-petition interest.

So ordered.

By the Court,

/s/
James N. Gabriel
Chief Judge

Dated at Boston, in said District, this 16th day of April, 1987.

cc: Christopher W. Parker, Esquire
Julia E. Singleton, Esquire
Leonard Goldberg, Esquire

APPENDIX F

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In Re:	
NEWBURY CAFE, INC. d/b/a 29 Newbury Debtor	Chapter 7 Case No. 85-01113-JG
STEPHEN J. GRAY, TRUSTEE IN BANKRUPTCY of NEWBURY CAFE, INC., d/b/a 29 Newbury Plaintiff	Adv. No. 86-1394
v.	
PATRIOT BANK, UNITED STATES OF AMERICA, JANE BRODEY AND COMMONWEALTH OF MASSACHUSETTS Defendants	

O R D E R

In accordance with the memorandum of April 16, 1987,

it is hereby found that the DOR is not entitled to post-petition interest. Accordingly, judgment is entered for the Trustee with respect to its complaint against the DOR.

By the Court,

/s/
James N. Gabriel
Chief Judge

Dated at Boston, in said District, this 16th day of April, 1987.

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing

of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not allowed secured claim, such lien is void, unless -

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1784

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

STEPHEN S. GRAY, TRUSTEE IN
BANKRUPTCY OF NEWBURY CAFE, INC.,
d/b/a 29 NEWBURY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 9, 1988

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I

QUESTION PRESENTED

Respondent accepts Petitioner's version of the question presented in this case as presented on page i of the Petition for a Writ of Certiorari.

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TABLE OF AUTHORITIES

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Statutes:

11 U.S.C. § 506(b) ..... *passim*

§ 552(b) 3

§ 726(a)(5) 3

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COMMONWEALTH OF MASSACHUSETTS,
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To the Honorable William J. Brennan, Jr., Associate Justice of the United States and Circuit Justice for the First Circuit:

Now comes Stephen S. Gray, the Trustee In Bankruptcy (the "Trustee") of Newbury Cafe, Inc. (hereinafter the "Respondent") and respectfully submits the within Brief In

Opposition to Petition For Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, and respectfully requests that the Court deny the petition filed by the Commonwealth of Massachusetts (hereinafter the "Petitioner") in the above-referenced case.

III. OPINIONS BELOW

Respondent accepts the version of the opinions below presented on page 1 of the Petition for a Writ of Certiorari.

IV. JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction presented on page 2 of the petition.

V. STATUTE INVOLVED

Respondent accepts the statute presented on page 2 of the petition as the statute involved in this case.

VI. STATEMENT OF THE CASE

The Respondent adds to the statement of the case presented by the Petitioner beginning on page 2 of the instant petition.

Respondent emphasizes that the First Circuit's decision upholding the well-established pre-Bankruptcy Code rule that postpetition interest is payable only on "claims secured by bargained-for or consensual liens" (Petition at A. 7) was based squarely on the long-respected notion that "if Congress intends . . . to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986); see also *In Re Ron Pair Enterprises, Inc.*, 828 F.2d 367, 370, 372-73 (6th Cir. 1987) (where the Court of

Appeals for the Sixth Circuit relied on this settled principle of statutory construction as grounds for denying taxing authority's claim to postpetition interest). After a full consideration of the issues in this case based upon well-established principles of statutory construction, the First Circuit found no congressional intent to upset pre-Code bankruptcy law.

VII. REASONS WHY THE PETITION SHOULD BE DENIED

A. The First Circuit Reasonably and Fairly Applied a Long Respected Method of Statutory Construction and Merely Adopted an Established Concept of Bankruptcy Law.

The question presented in this case is whether section 506(b) of the Bankruptcy Code entitles a creditor to receive postpetition interest on an oversecured claim allowed in a bankruptcy proceeding, or more specifically, whether an oversecured nonconsensual lienholder such as the Massachusetts Department of Revenue may receive postpetition interest in a bankruptcy proceeding.

The First Circuit, in a thorough examination of the issue, correctly and fairly applied the settled principle of statutory construction followed in *Midlantic National Bank*. The court reasonably found that a comma placed before the conjunction "and" in section 506(b) simply did not reveal a specific congressional intent to upset established bankruptcy law, especially in light of congressional familiarity with existing law as evidenced by Congress' *specific* preservation in sections 552(b) and 726(a)(5) of the Bankruptcy Code of two pre-Code exceptions to the general rule disallowing postpetition interest (Petition at A. 10, 11).

Respondent asserts that the First Circuit's conclusion was a fair, balanced and rational conclusion, and that nothing has

been shown by the petition to warrant reexamination of the First Circuit's reasonable application of settled principles of statutory construction.

B. The Assets of the Debtor's Estate Are Limited

The Trustee notes that the Massachusetts Department of Revenue, by pursuing appeals from the bankruptcy court's order of April 16, 1987, has delayed the closing of the debtor's estate for over a year at considerable cost to that limited estate. The Respondent respectfully submits that continued delay will further inure to the detriment of the estate's creditors including the Internal Revenue Service and the Massachusetts Division of Employment Security.

C. The Issues Presented in the Petition For Certiorari Are Already Before the Court in Another Case

As Petitioner notes in the instant petition on page 1, the "question presented in this case is the same as that presented in *United States* v. *Ron Pair Enterprises, Inc.*, (No. 87-1043), in which the [C]ourt has already granted a writ of certiorari."

Respondent respectfully submits that the Court should not be overburdened by unnecessary consideration of cases involving identical issues. Respondent notes that the Commonwealth of Massachusetts could have filed an amicus curiae brief with the Court in support of the United States in the case of *Ron Pair*, however Petitioner is now barred from doing so because the filing date for briefs in support of the United States was June 4, 1988.

VIII. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN S. GRAY
TRUSTEE IN BANKRUPTCY OF
NEWBURY CAFE, INC. d/b/a
29 NEWBURY,

By his attorney,

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Dated: June 9, 1988